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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 3, 1998

William E. Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: State Versus Federal Jurisdiction Over Dial-Up Calls To ISPs (Materials For The Record In CC Dkt. Nos. 96-98 and 98-79)

Dear Chairman Kennard:

This letter is being filed on behalf of Global NAPs, Inc. ("GNAPs"), a competitive local exchange carrier ("CLEC") operating in Massachusetts and New York and soon in other states as well. The purposes of this letter are (a) to urge the Commission to issue its order regarding reciprocal compensation for dial-up calls to ISPs and (b) to explain why it is appropriate for state regulators to have addressed this issue even if this Commission has jurisdiction over such calls.[1]

1. Background.

As part of its market entry strategy, GNAPs has identified a group of telecommunications users — Internet Service Providers ("ISPs") — who have been ill-

[1] GNAPs assumes in this letter that the Commission will, indeed, assert jurisdiction over calls from end users to ISPs. Obviously, if these calls are properly viewed as wholly intrastate in nature, then there is no possible basis to question state commission authority to determine reciprocal compensation obligations with regard to them.

served by incumbent LECs ("ILECs"), and has focused its initial marketing on those users. GNAPs has been in operation for one year and has invested several million dollars in new switching equipment (full-featured "class 5" end office switches) to serve its customers. As GNAPs becomes established it is branching out into other market segments, but serving ISPs remains a key part of GNAPs' marketing plan.

ISPs receive many local calls from their subscribers, so GNAPs is interested in the rules governing reciprocal compensation payments when the caller and the ISP are served by different LECs. Without some compensation regime, ISPs will have no competitive alternatives for their connections to the public switched network ("PSN"). This is because the Commission has (properly) held for the last fifteen years that ISPs may not be charged per-minute access charges to receive dial-up calls. As a result, the only way a CLEC such as GNAPs can compete for the business of ISPs is if the originating LEC compensates the terminating LEC for the work (mainly switching) involved in terminating such calls. Such an arrangement makes economic sense because the originating LEC receives end user revenues to complete end-to-end calls to ISPs, including state-regulated local service charges and significant SLCs (up to $9.00 per month, adjusted for inflation) on second lines.

In GNAPs' case, Bell Atlantic is paying reciprocal compensation in Massachusetts in accordance with state regulatory rulings. Bell Atlantic, however, is so opposed to expansion of that arrangement that in New Jersey (for example) it has raised objections even to GNAPs' certification as a LEC. GNAPs' certification has been delayed by at least a month due to Bell Atlantic's anticompetitive efforts.

Bell Atlantic justifies its anticompetitive actions on the basis of various statements of this Commission. Specifically, despite the Commission's plain statement in the *GTE ADSL Order* that the analysis in that order could not be applied unthinkingly to the situation of dial-up calls to ISPs,[2] and despite your statement at the recent NARUC convention in Orlando that states have acted properly in resolving reciprocal compensation disputes that have been brought before them,[3] Bell Atlantic continues to assert that some aspects of the reasoning in the *GTE ADSL Order* compel the conclusions that (a) reciprocal compensation for dial-up calls to ISPs is inappropriate and (b) the New Jersey Board lacks jurisdiction to resolve the matter.

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[2] GTE Telephone Operating Cos., *Memorandum Opinion and Order*, CC Docket No. 98-79 (released October 30, 1998) at ¶¶ 2, 29.

[3] *See* http://www.fcc.gov/commissioners/kennard/speeches.html.

Particularly in light of your statements in Orlando, GNAPs is confident that the Commission's order will explain why state regulators such as the Board may issue decisions requiring reciprocal compensation under Sections 251 and 252 of the Act even though this Commission has ultimate legal jurisdiction over calls to ISPs. The remainder of this letter provides GNAPs' views regarding this issue for the Commission's consideration.

2. State And Federal Authority Regarding Dial-Up Calls To ISPs.

As noted above, GNAPs assumes for purposes of this letter that the Commission will conclude that it has jurisdiction over dial-up calls to ISPs as a type of "interstate communication" under 47 U.S.C. §§ 152(a) and 153(22). GNAPs assumes that the basis of such a conclusion would be that a substantial (and potentially inseverable) portion of the transmissions from end users are properly viewed as continuing from the end user's computer, through the PSN to the ISP, and then on to distant web sites and/or other Internet end nodes, and that transmissions from those distant sites similarly may be viewed as traveling in an unbroken manner to the end user.[4] If this is true, how can the states ever have had legal authority even to consider the regulatory treatment of dial-up calls to ISPs, whether in the context of reciprocal compensation under Section 251(b)(5) or otherwise?

a. "Delegation" Of Authority To The States.

The first answer is that for fifteen years the Commission has held that dial-up calls to ISPs are in fact jurisdictionally interstate, but at the same time directed that ISPs be permitted to purchase intrastate local exchange services as business end users precisely in order to receive local calls. In other words, while the Commission has jurisdiction over such calls, its consistent position has been, in effect, to delegate regulatory authority over them to the states.

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[4] GNAPs notes two factors that might affect such a conclusion, however. First, for a substantial fraction — possibly exceeding 90% — of the time that a typical dial-up user is online, the only signals being transmitted begin and end with the subscriber's modem and the ISP's modem. These modem synchronization signals are integral to the ISP's information service offered to end users but do not entail any transmissions to or from "the Internet" as such. Second, increasingly ISPs are relying on web caching and similar arrangements under which they obtain independently, and store locally, information that they anticipate their subscribers will want to access. It could reasonably be argued that transmission to end users of files cached by ISPs in anticipation of demand are not properly viewed as "interstate" in nature, even if the ISP initially obtained the files from out of state.

This is the gravamen of the Commission's recent victory against Bell Atlantic and others in *Southwestern Bell v. FCC*, 153 F.3d 523, 541-43 & n.9 (8th Cir. 1998). *Southwestern Bell* involved (among other issues) a challenge by ILECs to the Commission's affirmation in the *Access Charge Reform Order* that ISPs are to be treated as local end users despite the interstate nature of the underlying communications.[5] In the *Access Charge Reform Order* the Commission stated:

> As a result of the decisions the Commission made in the *Access Charge Reconsideration Order* [in 1983], ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.[502]
>
> [502] *ESP Exemption Order*, 3 FCC Rcd at 2631 nn. 8, 53. To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.

Access Charge Reform Order at ¶ 342 & n.502. The 8th Circuit affirmed this conclusion:

> Initially we note that the FCC has maintained the same position for the past fourteen years, refusing to permit the assessment of interstate access charges on ISPs. ... Furthermore, the Commission's actions do not discriminate in favor of ISPs, which do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.[9]
>
> [9] ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses

[5] In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, *First Report and Order*, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*").

> the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.

Southwestern Bell, 153 F.3d at 542. The court went on to explain:

> We disagree with the petitioners' [*i.e.*, Bell Atlantic's] characterization of the manner in which ISPs use the local network and thereby generate interstate costs susceptible to FCC regulation. ... [T]he Commission has ***appropriately exercised its discretion*** to require an ISP to pay intrastate charges for its line and to pay the [Subscriber Line Charge] (which has been increased in the Order to cover a greater proportion of interstate allocated loop costs), but not to pay the per-minute interstate access charge.

Id. at 543 (emphasis added).

The court clearly accepts both the conclusion that this Commission has jurisdiction over dial-up calls to ISPs and the conclusion that a reasonable exercise of that jurisdiction is to "require" that ISPs "pay intrastate charges for its line[s]" used to "receive local calls from customers who want to access the ISP's data."

From GNAPs' perspective, the combination of (a) fifteen years' of consistent Commission practice (jurisdictionally interstate dial-up calls to ISPs treated as local calls made using intrastate-tariffed services by both end users and ISPs) and (b) the 8th Circuit's specific affirmance of this approach, completely resolves the question at hand. Until and unless the Commission directs otherwise, calls to ISPs are "treated as" intrastate local calls (assuming that the ISP's NXX code may be reached without toll charges to the caller, *i.e.*, assuming that the calls are "telephone exchange service" as opposed to "telephone toll service" under 47 U.S.C. §§ 153(47) & 153(48)).

The ILECs have claimed that the Commission's decision to treat calls to ISPs as local calls has been limited to the access charge arena. This assertion is false. The Commission has treated ISPs as "end users" as opposed to "carriers" (*i.e.*, as entities that can receive local calls like any other end user) for purposes of access charges under

Section 201;[6] for purposes of ILEC nondiscrimination obligations under Section 202;[7] for purposes of interconnection rights under Section 251(c);[8] and for purposes of universal service payment obligations under Section 254.[9]

Under current law, therefore, the Commission has directed that calls to ISPs be treated for regulatory purposes like local calls to any other end user. The Commission may choose to exercise its discretion in a different manner in the future, based on a proper record and an adequate explanation for the change in policy. It is quite clear, however, that ***every*** time the Commission has confronted the issue since the passage of the 1996 Act, it has acted in a manner that — consistent with its treatment of ISPs for access charge purposes — permits ISPs to be treated as end users who may purchase intrastate local exchange services in order to receive intrastate-regulated local calls over the public switched network.

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[6] *Access Charge Reform Order, supra. See also* In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, *Order,* 3 FCC Rcd 2631 (1988) at ¶ 20 n.53 ("[T]he current situation of enhanced service providers [of which ISPs are examples] for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges.")

[7] In the Matter of *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, *Further Notice of Proposed Rulemaking,* 13 FCC Rcd 6040 at ¶ 33 (including ISPs among the category of "end users").

[8] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499 (1986) at ¶ 995 (ISPs as such are end users, not carriers, and so do not have interconnection rights as "requesting telecommunications carriers").

[9] In the Matter of Federal-State Joint Board on Universal Service, *Report and Order,* CC Docket No. 96-45 (released May 8, 1997) at ¶¶ 788-90 (there is a distinction between the telecommunications functions that carriers provide to link end users to ISPs, which ***are*** "telecommunications" subject to universal service assessments, and the information services that ISPs provide, which are ***not*** "telecommunications" and not subject to universal service assessments). *See also* In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress*, 13 FCC Rcd 11501 (1998) at ¶¶ 13, 105 (ISPs are customers of carriers, not themselves carriers).

In these circumstances the Commission would be on extremely firm legal ground in ruling that states have acted properly in dealing with reciprocal compensation issues regarding dial-up calls to ISPs even though the Commission, and not the states, has ultimate jurisdiction over these calls. Under the legal and regulatory regime that exists today, the Commission has the "discretion" to "require" that ISPs obtain PSN connections out of intrastate local exchange tariffs, and has in fact done so. *Southwestern Bell, supra.* Until and unless the Commission chooses to exercise its discretion in a different way, it would actually be peculiar to treat dial-up calls to ISPs as anything other than local calls subject to state regulatory jurisdiction.[10]

b. Concurrent Jurisdiction Under Sections 251/252 (State) And Section 201 (Federal).

One can imagine an argument to the effect that, if state commissions have any jurisdiction with respect to dial-up calls to ISPs under Sections 251/252, then this Commission is necessarily deprived of any authority over such calls. Such an argument would likely be based on an overly broad reading of the 8th Circuit's decision in the *Iowa Utilities Board* case now before the Supreme Court.[11]

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[10] To say that the Commission's present legal regime requires that dial-up calls to ISPs be treated as intrastate local calls — including for purposes of reciprocal compensation under Section 251(b)(5) — does not by any means require the Commission to embrace the precise legal and regulatory analysis of any particular state commission that has concluded that reciprocal compensation for such calls is required. To the contrary, the Commission would presumably disagree with states that have held that dial-up calls to ISPs "really are" jurisdictionally intrastate, which would imply — contrary to the 8th Circuit's ruling in *Southwestern Bell* — that the Commission lacks the authority to direct the regulatory treatment of these calls. But if the Commission agrees that ***at least for now*** such calls have properly been treated as if they were jurisdictionally intrastate (in accordance with fifteen years of precedent under various sections of the Act), such disagreements are academic.

[11] Parties before the Commission in the ALTS declaratory ruling docket have pointed out that the *Iowa Utilities Board* decision makes clear that its ban on Commission activity in the Section 251/252 realm is limited to traffic that is both intrastate and local. The Eighth Circuit's express recognition that there can be interstate, local calls in the CMRS context makes clear that the court understood that not all local traffic is necessarily jurisdictionally intrastate. *See* Reply Comments of Adelphia Communications, *et al.*, DA 97-1399, CCB/CPD 97-30 (filed July 31, 1997). That same court's recent decision in the *Southwestern Bell* case — affirming ***this Commission's*** discretion to direct that ISPs may purchase local exchange

(continued...)

Any claim that the existence of state regulatory authority over calls to ISPs under Section 251(b)(5) deprives the Commission of its pre-existing authority under Section 201, however, is contradicted by the statute itself.

As noted above, for fifteen years this Commission has held that calls to ISPs are interstate access (albeit a form of access subject to special rules in light of the distinctive nature of ISPs, their use of the PSN, and their interconnection needs). This means that like other access traffic, calls to ISPs are subject to the Commission's authority under Section 201 of the Act.

Because the Commission's authority over dial-up calls to ISPs arises under Section 201, that authority is not affected even if states also have authority over such calls in various respects in connection with Section 251(b)(5). This is because Section 251(i) specifically states that "[n]othing in this section [Section 251] shall be construed to limit or otherwise affect the Commission's authority under Section 201."

It may be that the states acquired certain authority with respect to dial-up calls to ISPs by virtue of their responsibility to implement Section 251(b)(5) (and other sub-sections of Section 251) in arbitrating and enforcing interconnection agreements. If they did, though, Section 251(i) means that their authority does not "limit or otherwise affect" ***this*** Commission's pre-existing authority under Section 201. It follows that if this Commission could direct the proper treatment of dial-up calls to ISPs prior to the passage of the 1996 Act, it can do so today — any other result would "limit" the Commission's Section 201 authority.

Under this analysis, the states' authority to determine reciprocal compensation issues for dial-up calls to ISPs does not arise from a "delegation" to the states from the Commission, as discussed above. Instead, under this analysis, the states' authority exists independently and arises from their role in implementing and enforcing the "duties" established in Section 251(b) and (c). That state authority, however, remains subservient to this Commission's authority under Section 201 to govern the terms and conditions under which interstate access services are provided.[12]

[11](...continued)
services in order to receive local calls — also suggests that there is nothing contradictory about calls being both interstate and local simultaneously.

[12] From this perspective, interconnection agreements that embrace calls to ISPs constitute carrier-to-carrier contracts that relate to "traffic affected by the provisions of this Act" under (continued...)

* * * * *

GNAPs is not itself ultimately certain whether dial-up calls to ISPs are properly classified as "interstate" or not.[13] GNAPS is certain, however, that *if* such calls are jurisdictionally interstate, such a conclusion in and of itself in no way deprives state commissions of the authority to impose reciprocal compensation obligations with respect to them, either by virtue of authority delegated from this Commission or independently under Sections 251 and 252 — in each case subject to this Commission's authority over jurisdictionally interstate communications.

Please contact the undersigned (or request your staff to do so) if you have any questions regarding this matter.

Respectfully submitted,

Christopher W. Savage
Attorney for
GLOBAL NAPS, INC.

cc: Commissioner Ness
Commissioner Powell
Commissioner Tristani
Commissioner Furtchgott-Roth
Common Carrier Assistants
Ms. Kathryn Browne

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[12](...continued)
Section 211(a), and the Commission may review such contracts to ensure that their terms comport with Commission requirements.

[13] *See* note 4, *supra.*